

Arrest Law Bulletin

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Interrogation

Defendant claims agent used deliberate two-step tactic to avoid *Miranda*

Citation: *U.S. v. Williams*, 681 F.3d 35 (2d Cir. 2012)

The Second U.S. Circuit has jurisdiction over Connecticut, New York, and Vermont.

Williams, along with his cousin Walker, was arrested in a Bronx, New York, apartment following the execution of a search warrant that led to the recovery of four firearms. According to Williams' subsequent confession, he, Walker, and a man named Smith had arrived in New York City the previous morning from Birmingham, Alabama. Williams and Smith planned to sell 13 guns they had procured in Alabama.

Williams was not the primary target of the search warrant; Smith was. For a year and a half, officers of the Bureau of Alcohol, Tobacco, Firearms and Explosives (ATF) and the New York City Police Department (NYPD) had, based on the report of a confidential informant, been investigating a man known to the informant as "Alabama," whom they suspected of buying firearms in Alabama for resale in New York. On the day of Williams' arrest, the informant spotted "Alabama" and two other men selling firearms at the Bronx apartment, and notified an NYPD detective. At the detective's instruction, the informant returned to the apartment and purchased a firearm from "Alabama" in the presence of the two other men. He then reported to the detective that multiple firearms were being sold by the three men at the apartment.

The detective relayed the information to Agent D'Antonio, who prepared an application for a search warrant that was issued around 8:30 p.m. that evening. Agent D'Antonio said it was important to obtain the search warrant promptly because "we had information that there were multiple firearms at the location being sold by two or three of those individuals. And there were totaling over 10 firearms . . . At that point, we wanted to get the firearms off the street. We did not want them to get out of the apartment . . . [and] sold and used for illegal purposes up there."

Law enforcement officers executed the search warrant at approximately 10:30 p.m. NYPD personnel entered the apartment first and secured its four occupants: Williams, Walker, and two women. Five ATF agents, including Agent D'Antonio and Agent Kelly, and several more NYPD police officers, including Detective Santiago, then entered the apartment. They found Williams and Walker seated and handcuffed on the floor of the living

Use of Force

Officer's use of Taser on nonviolent, nonfleeing misdemeanor was excessive use of force

Citation: *Shekleton v. Eichenberger*, 677 F.3d 361 (8th Cir. 2012)

The Eighth U.S. Circuit has jurisdiction over Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

Upon leaving a bar one night, Justin Shekleton stopped outside to talk to some people including Pamela Rausch, one of the bartenders. While driving past on patrol, Deputy Ryan Eichenberger observed Shekleton and Rausch and believed that they were arguing and that their voices were loud. Shekleton and two others who were present stated under oath that the conversation between Shekleton and Rausch was a friendly one.

Deputy Eichenberger communicated to dispatch that he had observed two people arguing outside the bar and that he was going to investigate. He drove back to the bar.

When he arrived on foot at the bar, Shekleton was walking away and Rausch had already gone inside. Deputy Eichenberger asked Shekleton why he had been arguing with Rausch. Shekleton explained that they had not been arguing. Deputy Eichenberger asked the same question again, and Shekleton again responded that there had been no argument. He suggested that Deputy Eichenberger go in and ask Rausch. At this point, two other officers arrived on the scene and Deputy Eichenberger sent them in to speak with Rausch.

Deputy Eichenberger believed Shekleton was intoxicated and asked him to move away from the street corner. In response, Shekleton moved back and leaned against the wall of a store adjacent to the bar. Deputy Eichenberger then asked Shekleton for a third time to explain why he had been arguing with Rausch. According to Deputy Eichenberger, Shekleton then became agitated, told Deputy Eichenberger he had not been arguing with Rausch, and demanded that Deputy Eichenberger "fucking apologize" to him. Shekleton agreed he asked for an apology, but denied using an obscenity. The three affiant witnesses supported Shekleton's version of events.

After Shekleton demanded an apology, he stopped leaning against the wall, unfolded his arms, and turned toward Deputy Eichenberger. Deputy Eichenberger believed this behavior was threatening; however, Shekleton stated under oath that he did not behave aggressively. Deputy Eichenberger then twice in-

structed Shekleton to place his hands behind his back. Shekleton told Deputy Eichenberger both times that he was unable to place his arms behind his back. In 1998, Shekleton suffered a head injury as a result of a hunting accident and has since suffered from left-side dystonia, a condition that causes his left arm to shake beyond his control. Deputy Eichenberger responded "I know" after Shekleton told him he could not control his arm. Additionally, Shekleton has lived in New Hampton since 1997 and is a well-known businessman in the community of approximately 3,700 people. Likewise, many in the small community know of his disability.

When Shekleton did not place his arms behind his back, Deputy Eichenberger attempted to handcuff him. According to Shekleton, Deputy Eichenberger lost his grip on Shekleton as the two accidentally fell in Deputy Eichenberger's attempt to handcuff him. According to Eichenberger, Shekleton broke away from him in an attempt to resist arrest. At this point, the other two officers exited the bar and heard Deputy Eichenberger tell Shekleton to stop resisting. One of the two officers then attempted to help restrain Shekleton by grabbing his arm but was unable to do so. At that point, Deputy Eichenberger yelled "taser, taser, taser" and discharged his Taser at Shekleton with the probes striking Shekleton's upper chest and rib cage. The electric charge from the probes caused Shekleton to fall face-first to the ground, and as a result Shekleton suffered minor head injuries.

While Shekleton was on the ground, he was double-handcuffed, a process that allows for extra space between the arms. He was arrested for public intoxication and interference with official acts, but was taken to the hospital for treatment of his injuries before booking. The charges were later dropped.

Shekleton brought an action pursuant to 42 U.S.C.A. § 1983, alleging that Deputy Eichenberger violated his Fourth Amendment right to be free from excessive force by unnecessarily tasing him. The district court denied Eichenberger's motion for summary judgment. Eichenberger appealed, arguing that the claim was barred by qualified immunity.

DECISION: Affirmed.

Qualified immunity protects officers from liability in a 1983 case unless the official's conduct violates a clearly established constitutional or statutory right of which a reasonable person would have known. Evaluating a claim of qualified immunity requires a two-step inquiry: (1) whether the facts shown by the plaintiff make out a violation of a constitutional or statutory right, and (2) whether that right was clearly established at the time of the defendant's alleged misconduct.

The court first addressed whether Shekleton had established that a violation of a constitutional or statu-

tory right occurred. He claimed Deputy Eichenberger violated his rights by using excessive force in violation of the Fourth Amendment because he deployed his Taser. To establish a constitutional violation under the Fourth Amendment's right to be free from excessive force, the test is whether the amount of force used was objectively reasonable under the particular circumstances. The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene. In determining reasonableness, a court considers the totality of the circumstances and the severity of the crime at issue, the immediate threat the suspect poses to the safety of the officer or others, and whether the suspect is actively resisting or attempting to evade arrest by flight. Force is least justified against nonviolent misdemeanants who do not flee or actively resist arrest and pose little or no threat to the security of the officers or the public.

Viewing the facts in the light most favorable to Shekleton, the court found that a reasonable officer would not have concluded that an argument occurred between Shekleton and Rausch. When Deputy Eichenberger arrived at the scene, Rausch was inside the bar, and Shekleton was leaving the area. Shekleton told Deputy Eichenberger repeatedly that he had not been arguing with Rausch. Shekleton complied with the officer's orders to step away from the street and did not behave aggressively towards Deputy Eichenberger, nor did Shekleton direct obscenities towards Eichenberger or yell at him. When Deputy Eichenberger told Shekleton to place his arms behind his back, Shekleton told Deputy Eichenberger repeatedly that he could not physically do so. Shekleton's disability was well known in the community, and Eichenberger verbally acknowledged he was aware that Shekleton could not physically place his arms behind his back. Although Deputy Eichenberger and Shekleton fell apart from each other when Deputy Eichenberger attempted to handcuff Shekleton, Shekleton did not resist and did not intentionally cause the two to break apart.

Under these facts, the court held that Shekleton was an unarmed suspected misdemeanor, who did not resist arrest, did not threaten the officer, did not attempt to run from him, and did not behave aggressively towards him. Shekleton had established that a violation of a constitutional right occurred in that a reasonable officer would not have deployed his Taser under the circumstances as presented.

Having determined that Shekleton has established that a violation of a constitutional right occurred, the court turned to determining whether Deputy Eichenberger's use of the Taser against Shekleton constituted a clearly established constitutional violation. Deputy Eichenberger contended that at the time of the incident it was not a clearly established violation of law to use his Taser under the circumstances and contends that Taser jurisprudence is in a state of flux.

When determining whether an action was a clearly established constitutional violation, the court looks to the state of the law at the time of the incident. The relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted. A general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though the very action in question has not previously been held unlawful.

The court said that Deputy Eichenberger was correct that at the time of the incident, the court had not yet had an opportunity to determine whether an officer's use of a Taser on a nonviolent, nonfleeing misdemeanor was an excessive use of force. However, the right to be free from excessive force dates back to the adoption of the Bill of Rights of the U.S. Constitution, as it is a clearly established right under the Fourth Amendment's prohibition against unreasonable seizures of the person. That the level of force used must be justified in light of the severity of the crime at issue, the suspect's flight risk, and the immediacy of the risk posed by the suspect to the safety of officers and others was, said the court, the clearly established law on the night of the incident.

The court noted that the general constitutional principles against excessive force that were clearly established at the time of the incident between Deputy Eichenberger and Shekleton were such as to put a reasonable officer on notice that tasing Shekleton under the circumstances as presented by Shekleton was excessive force in violation of the clearly established law.

See also: *Brown v. City of Golden Valley*, 574 F.3d 491 (8th Cir. 2009).

See also: *Johnson v. Carroll*, 658 F.3d 819 (8th Cir. 2011).

In Brief

Florida

Detention

The body of Jerome Jones was found lying face up in the roadway about 100 feet from the parking area of a rest stop on Alligator Alley. He had been shot in the back of his head. A Parliament brand cigarette was located about two and a half feet from Jones' foot.

Detective Efrain Torres of the Broward Sheriff's Office (BSO) was dispatched to the crime scene and assigned to be the lead homicide investigator. After the victim had been identified, Detective Torres was able

to locate the victim's half brother, who indicated that Jones had come to Florida to conduct a drug deal with Luis Garcia.

Based on this information, Detective Torres decided to question Garcia. Garcia was not at his home or his girlfriend's residence either when the police arrived. Detective Torres used Garcia's cell phone number to track his location. Torres sought assistance from the local police department. He advised them that Garcia was a possible murder suspect and gave a description of the van Garcia was likely driving and Garcia's approximate location.

Officer Nicholas Taber located a van matching the description driving in the area specified. He stopped the van which was in fact being driven by Garcia. With their guns drawn and pointed toward the van, Officer Taber and another officer ordered Garcia to exit the van, handcuffed him, patted him down, and then put him in the back of a locked patrol car.

A few minutes later, Detective Torres arrived. He took Garcia out of the car and the handcuffs were removed. Detective Torres informed Garcia that he wanted to speak to him about Jones and asked Garcia to come with him to the BSO public safety building. According to Detective Torres, Garcia agreed to this request.

Garcia was transported in Taber's patrol car because it contained a cage. Garcia was not handcuffed during transport. On the way, they stopped by a garage where Garcia had told Detective Torres his BMW was being repaired. Garcia did not get out of the patrol car and was never offered the opportunity to do so. From there, they all continued to BSO headquarters.

A video recording of the incident shows a handcuffed Garcia being led into an interview room at approximately 8:00 p.m., Detective Torres removing handcuffs from Garcia, and then the detective leaving Garcia alone in the interview room for approximately 40 minutes. The door to the room was locked while Garcia waited. At approximately 8:40 p.m., Detective Torres returned and advised Garcia of his *Miranda* rights. Garcia signed a form acknowledging that he was waiving his rights and agreeing to speak with the detective. Garcia also signed consent forms allowing the police to search his residence, two vehicles, and phone records.

In response to Detective Torres' questioning, Garcia claimed that he had arranged for Jones to purchase a large quantity of cocaine and that he was paid \$3,000 for arranging this deal. Garcia agreed to take Jones in Garcia's BMW but had car trouble en route, so he pulled into a gas station. Jones asked Garcia to take him back to his brother's residence, which Garcia did. Once there, Jones got into a car with two men and a woman and left. Garcia stated that he did not drive to

Alligator Alley and that, at 8:30 p.m., he was at home with his son.

The interview continued until the early morning hours. At the conclusion, Detective Torres and another law enforcement officer drove Garcia home in a regular undercover car without a cage.

A few days later, Detective Torres called Garcia and asked him to come to the station again. Garcia agreed to do so and returned there on his own. Detective Torres again read the *Miranda* warnings to Garcia and Garcia again signed a written waiver. Garcia also consented to a DNA sample at that time.

During this second interview, Garcia changed his story, asserting instead that he had actually taken Jones to Naples and that he had lied about not being on Alligator Alley. Garcia said that on the way to Naples, he saw that Jones had a gun. Upon seeing the gun, Garcia immediately exited the highway and told Jones to get out of the car. Garcia said that he left Alligator Alley as soon as he dropped off Jones.

Later in the interview, Garcia changed his story again. This time, he claimed that he had tried to set up a deal for Jones, but that the deal never occurred. Instead, Jones arranged his own deal with people who were unknown to Garcia. Garcia agreed to drive Jones to the deal and was supposed to be paid \$3,000 for doing so. Jones instructed Garcia to drive them to the recreation area on Alligator Alley where law enforcement later found Jones dead. Garcia claimed that he witnessed a man shoot Jones in the back of the head, take the bag of cocaine from Jones, and then exclaim that Jones had given them "fake money."

At the conclusion of this interview, Officer Torres placed Garcia under arrest. At the time that Garcia was arrested, he had a Parliament brand cigarette, the same brand of cigarette which was found at the crime scene, and \$2,700 in cash on his person.

Prior to trial, Garcia filed a motion to suppress evidence alleging that Garcia's original detention was unlawful. At the suppression hearing, Detective Torres and Officer Taber testified regarding their investigation and interaction with Garcia. Additionally, Detective Torres testified during cross-examination that although Garcia was never under arrest during the initial questioning, the detective did not remember if at any point he or anyone else told Garcia that he was free to leave.

The trial court denied Garcia's motion to suppress and found that Detective Torres had "sufficient articulable facts to support his reasonable suspicion of possible criminal behavior justifying the investigatory stop" of Garcia. The court further found that Officer Taber, "in the interest of officer safety, reasonably frisked and handcuffed a person reported to be a murder suspect." According to the trial court, "this brief handcuffing" was a temporary detention and not an

arrest. The court also found that Garcia had “freely and voluntarily consented to the search of his residence, two vehicles and his telephone.”

A jury found Garcia guilty of first-degree murder and the court sentenced him to life in prison. Garcia appealed.

DECISION: Reversed and remanded.

On appeal, Garcia argued that the trial court erred in denying his motion to suppress evidence. He claimed that the police lacked reasonable suspicion to stop him initially. Garcia further argued that even if police had reasonable suspicion, his initial detention was unlawful because the encounter became a de facto arrest without probable cause when Garcia was transported to the public safety building for questioning.

The appellate court found that the initial detention of was an investigatory stop. Whether Detective Torres had reasonable suspicion to justify the traffic stop of Garcia was questionable to the court. The evidence, seen in a light most favorable to sustaining the trial court’s ruling, showed had reasonable suspicion to justify the initial investigatory stop of Garcia to question him or investigate his role in Jones’ death.

Garcia argued that even if the initial detention was proper, the temporary detention at the side of the road was converted into a de facto arrest without probable cause when the police brought him to the police station for further questioning. The state contended that Garcia’s interrogation at the police station was a consensual encounter.

Factors to consider in determining whether a reasonable person would consider himself to be in custody under the totality of circumstances include: (1) the manner in which police summon the suspect for questioning; (2) the purpose, place, and manner of the interrogation; (3) the extent to which the suspect is confronted with evidence of his or her guilt; (4) whether the suspect is informed that he or she is free to leave the place of questioning.

Considering these factors, the appeals court concluded that a reasonable person in Garcia’s position would not have felt free to terminate the encounter with the police after the police had completed their investigatory stop.

First, the court found that the manner in which the police summoned Garcia for questioning would suggest to a reasonable person that he or she was not free to leave or terminate the encounter. Garcia was stopped while driving legally on a public road. The officers that pulled Garcia over approached his car with their guns drawn and pointed toward him. They ordered Garcia to exit the van, handcuffed him, patted him down, and then put him in the back of a locked patrol car. Although Detective Torres had Garcia removed from the patrol car and his handcuffs removed before asking

Garcia to come to the public safety building with the officers, a reasonable person in Garcia’s position would likely interpret the previous show of authority as an indication that he had no choice but to comply with Detective Torres’ request.

Additionally, the court noted that Garcia was never informed that he was not under arrest and that he was free to leave the place of questioning. Even if Garcia’s initial agreement to return to the public safety building with Detective Torres constituted valid consent, the court found that the otherwise consensual encounter matured into a seizure at some point before Garcia’s interrogation began.

At the public safety building, Garcia was led into an interview room in handcuffs. The handcuffs were removed, but Garcia was then left alone in the locked interview room for approximately 40 minutes. At that point, Detective Torres returned and read Garcia his *Miranda* rights. Detective Torres did not, however, tell Garcia that he was not under arrest or that he could leave at any time. Under the circumstances of this case, the police conduct of reading the *Miranda* warnings after having locked the citizen in an interview room for 40 minutes would communicate to a reasonable person that he or she was no longer free to leave regardless of the previous nature of the police encounter.

Thus, based on the totality of these circumstances, the court concluded that a reasonable person in Garcia’s position would not have felt that he or she was free to leave or terminate the encounter.

The court also held that statements that Garcia made to the during these initial events should have been inadmissible at trial. The statements that Garcia made a few days later, however, were free of the taint of the illegal arrest.

Citation: *Garcia v. State*, 2012 WL 1697440 (Fla. 4th DCA 2012)

Case Highlights

Both refusal to submit to lawful arrest and resistance by force or threat of force are necessary to commit offense of resisting arrest

Under Maryland law, both a refusal to submit to lawful arrest and resistance by force or threat of force are necessary to commit the offense of resisting arrest. Mere flight, without more, is not sufficient to establish resistance by force or threat of force, which is a necessary element of the offense of resisting arrest. Consequently, a defendant’s mere flight from an officer did

not amount to resistance by force and, hence, could not legally suffice to support a conviction for resisting arrest.

Citation: *Rich v. State*, 2012 WL 1959308 (Md. Ct. Spec. App. 2012)

Officers had probable cause to arrest based on state law requiring driver's license to be in immediate possession of driver

Police officers had probable cause to arrest motorist for violating Michigan law requiring a driver to keep his driver's license in his immediate possession at all times while operating a vehicle and to provide it to police officers on request when motorist did not produce his driver's license during traffic stop.

Citation: *Hoover v. Walsh*, 2012 WL 2122485 (6th Cir. 2012)

Police were not entitled to qualified immunity for arrest of protesters whom they could not have believed received fair warning

Police officers were not entitled to qualified immunity from liability under § 1983 for arrest of "Occupy Wall Street" protestors, as while they had probable cause to believe that demonstrators had committed crimes of conducting a parade without a permit and engaging in disorderly conduct, a reasonable officer could not have believed, based on facts known to defendant officers, that demonstrators received fair warning that they could not proceed onto Brooklyn Bridge's vehicular roadway. While officers initially congregated at entrance thereto, effectively blocking demonstrators from proceeding further, their walking away from demonstrators and onto roadway was implicit invitation for demonstrators to follow, and single bullhorn was insufficient mechanism to warn 700 demonstrators not to proceed on part of bridge reserved for and used by vehicles.

Citation: *Garcia v. Bloomberg*, 2012 WL 2045756 (S.D. N.Y. 2012)

Evidence of invalid search incident to arrest admissible under good faith exception

Although arresting officer's search of defendant's

vehicle was not a valid search incident to arrest because defendant was seated in back of officer's patrol car at time of search, evidence gathered in the search was admissible under the good-faith exception to the exclusionary rule, in defendant's prosecution for being a felon in possession of a firearm, since the validity of the search under the Fourth Amendment as a search incident to arrest was supported at the time of the search by settled case law of the Circuit Court of Appeals, which was subsequently abrogated by a Supreme Court decision that was issued after the search of the defendant's car.

Citation: *U.S. v. Madden*, 2012 WL 2308633 (10th Cir. 2012)

Defendant's possession conviction was supported by sufficient evidence

Jury's finding that defendant had knowledge of and access to shotgun found in storage compartment in his home, as required for conviction for possession of a firearm by a felon, was supported by sufficient evidence, including evidence that he stated after his arrest that shotgun was found in black bag despite his denials at time of his arrest of knowledge of weapon and its location, and evidence that, despite defense's suggestion that shotgun had belonged to defendant's deceased father and essentially been forgotten, shotgun had only recently been handled and placed into compartment.

Citation: *U.S. v. Mudd*, 2012 WL 2335305 (5th Cir. 2012)

Officers entitled to qualified immunity for arrest of defendant who was intoxicated while sitting in driver's seat of her running vehicle

Police officers were entitled to qualified immunity from arrestee's civil rights claim that she was unconstitutionally detained without reasonable suspicion and arrested without probable cause for operating vehicle while intoxicated. It was not clearly established that arrestee had constitutional right to be free from detention and arrest while sitting, intoxicated, in driver's seat of her running vehicle that was legally parked, and reasonable officer could have concluded that arrestee's detention and arrest for "operating" her vehicle while intoxicated was lawful.

Citation: *Nettles-Nickerson v. Free*, 2012 WL 1958888 (6th Cir. 2012)